UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

STANLEY WHITNEY,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-65-P-H***
	)	
WAL-MART STORES, INC. , et al.,	***)***	
	)	
Defendants	***)***	

MEMORANDUM DECISION ON DEFENDANTS' MOTION TO EXCLUDE EVIDENCE AND RECOMMENDED DECISION ON MOTIONS FOR SUMMARY JUDGMENT AND DEFENDANTS' MOTION TO DISMISS

The plaintiff, Stanley Whitney, moves for partial summary judgment on one of his theories of liability in this case arising under the Family Medical Leave Act ("FMLA"), 29 U.S.C. § 2601 *et seq*. The defendants move to dismiss Count III of the complaint, which the plaintiff was recently granted leave to add, to exclude the report and testimony of the plaintiff's expert witness, and for summary judgment on all counts. I deny the motion to exclude and recommend that the court deny the plaintiff's motion, grant the motion to dismiss in part, and grant the defendants' motion for summary judgment in part. I take up the motion to dismiss first, followed by the motion *in limine* to exclude evidence and then the motions for summary judgment.

I. Motion to Dismiss

A. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6). Defendants' Motion to Dismiss Count III, etc. ("Motion to Dismiss") (Docket No. 33) at 1. "In ruling on a motion to dismiss [under Rule 12(b)(6)], a court must accept as true all the factual allegations in the complaint and construe all reasonable inferences in favor of the plaintiffs." *Alternative Energy, Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001). The defendants are entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 87 (1st Cir. 2001); *see also Wall v. Dion*, 257 F. Supp.2d 316, 318 (D. Me. 2003).

B. Factual Background

The amended complaint includes the following factual allegations relevant to Count III, the subject of the motion to dismiss. The plaintiff, a resident of Gorham, Maine, was first hired by defendant Wal-Mart in 1998 in Melbourne, Florida. Amended Complaint (Docket No. 31) ¶¶ 1, 5. Within six months he was promoted to a position as department manager and held management positions at Wal-Mart stores in Florida until October 2001, when he was hired by defendant Swink to be tire and lube express ("TLE") manager at the Wal-Mart store in North Windham, Maine. *Id.* ¶¶ 6-8. In November 2001 the plaintiff was diagnosed with cardiovascular disease, angina and a blocked artery. *Id.* ¶ 10. On December 5, 2001 the plaintiff requested a temporary medical leave of absence from Swink, who told the plaintiff that he would probably lose his job as a result of the request. *Id.* ¶¶ 14-15. The plaintiff was given a medical leave of absence from which he returned on January 28, 2002 with a doctor's note stating that he should not work more than 8 hours per day or 40 hours per week and should be given two consecutive days off each week. *Id.* ¶¶ 16-17.

The plaintiff worked January 28, 29 and 30, 2002. *Id*. ¶ 18. On January 30 he slipped on ice at home and injured himself so that he was unable to work on January 31 and February 1, 2002. *Id*. ¶ 19. On February 1, 2002 Swink informed that plaintiff that he should not return to work unless he could work 48-52 hours each week and that otherwise he would have to quit or take a demotion. *Id*. ¶ 20. On February 28, 2002 Swink wrote to the plaintiff, advising him that his FMLA leave had expired on February 27 and that his position would be filled by someone else if her could not provide assurance by March 7, 2002 that he would be available to work 48-52 hours per week. *Id.* ¶ 22. On March 5, 2002 the plaintiff provided the defendants with a doctor's note indicating that he could work 9 hours per day, five days per week with two consecutive days off. *Id*. ¶ 23.

Swink refused to reinstate the plaintiff to his position as TLE manager and on March 22, 2002 the plaintiff reluctantly accepted a position at the Wal-Mart store in Biddeford, Maine that resulted in a substantial loss of salary and fringe benefits. *Id*. ¶¶ 25-27.

Wal-Mart has adopted and published personnel policies which were in effect at all relevant times and which were incorporated into the plaintiff's contract of employment. *Id*. ¶ 39. These policies required supervisors to notify employees within two days after learning that they had qualifying medical conditions that they were entitled to FMLA leave. *Id*. ¶ 40. Swink was aware that the plaintiff had a qualifying medical condition but failed to notify the plaintiff as required by the policies that the plaintiff could resume his employment as TLE manager working not more than 45 hours per week. *Id*. ¶ 43. Because of the defendant's refusal to allow the plaintiff to return to his job on a "reduced leave basis," he was forced to take FMLA leave that he did not require so that his allotment was prematurely exhausted and his employment as TLE manager terminated. *Id*. ¶ 45.

C. Discussion

The cause of action asserted in Count III of the amended complaint is less than clear. The parties' memoranda of law address it as a claim for breach of contract, Motion to Dismiss at 1; Plaintiff's Memorandum Objecting to Defendants' Motion to Dismiss Count III of the Amended Complaint ("Dismissal Opposition") (Docket No. 46) at 1, and I will accordingly consider it as such.

The defendants contend that Count III fails to set forth the elements of a cause of action for breach of an employment contract and that defendant Swink is entitled to dismissal of this claim against him because there is no allegation that could reasonably be interpreted to allege that any contract of employment existed between him and the plaintiff. Motion to Dismiss at 2, 5. In response to the latter argument, the plaintiff asserts that Swink is liable for interfering with the plaintiff's advantageous contractual relationship with Wal-Mart. Dismissal Opposition at 3. There is no sense in which the language of the amended complaint could reasonably be interpreted to allege this completely distinct cause of action against Swink, and he is entitled to dismissal of Count III.

Much of the defendants' argument with respect to Wal-Mart on this issue is more appropriate to a motion for summary judgment than to one to dismiss. Given the applicable legal standard, paragraph 39 of the amended complaint could be read, with the benefit of reasonable inferences, to allege the existence of an employment contract. Whether such a contract in fact existed is not an issue to be resolved in the context of a motion to dismiss. The motion to dismiss Count III as to Wal-Mart should be denied.

II. Motion in Limine

The defendants move to exclude, pursuant to Fed. R. Evid. 403 and 702, the report and testimony of Mark G. Filler, the plaintiff's designated damages expert, on the grounds that they do not constitute expert opinion, will not assist the jury, lack reliability and will cause unfair prejudice, mislead the jury and

waste time.[1] Defendants' Motion in Limine to Exclude the Report and Testimony of Plaintiff's Damages Expert, etc. ("Motion in Limine") (Docket No. 24) at 1. Filler's "report" is apparently the chart attached to his affidavit as Exhibit C. Affidavit of Mark Filler ("Filler Aff."), Exh. 1 to Plaintiff's Objection to Defendants' Motion to Exclude the Expert Testimony of Mark Filler, etc. ("Filler Opposition") (Docket No. 41), Exh. C.

The trial court must ensure that all expert testimony is not only relevant but reliable. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

> Rule 702 consists of three distinct but related requirements. First, a proposed expert witness must be qualified to testify as an expert by "knowledge, skill experience, training, or education." Fed. R Evid. 702. Second, the expert's testimony must concern "scientific, technical or other specialized knowledge." Fed. R. Evid. 702. Finally, the testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702.

United States v. Shay, 57 F.3d 126, 132 (1st Cir. 1995) (case law citations omitted). The defendants do not challenge Filler's qualifications. The analysis accordingly will focus on the second and third requirements under Rule 702.

The defendants contend that Filler's testimony does not concern specialized knowledge but rather involves only "simple arithmetic" calculations. Motion in Limine at 2-3. An expert opinion must rely on expertise rather than "inferences from the record that [the expert] is no more qualified than the jury to draw." *TRW Title Ins. Co. v. Security Union Title Ins. Co.*, 887 F. Supp. 1029, 1032 (N.D.Ill. 1995). However, the plaintiff has demonstrated that Filler's familiarity with payroll codes and the computation of

[1] Ordinarily, motions *in limine* are decided by the judge who will conduct the trial. In this case, however, it is necessary that I address this motion and reach a decision because the defendants rely on Filler's testimony to support portions of the statement of material facts submitted with their motion for summary judgment. Defendants' Statement of Facts at to Which There is No Genuine Issue to be Tried ("Defendants' SMF") (Docket No. 22) at 1.

employee benefits is beyond that common to untrained members of the public. Filler Opposition at 3-4. Filler will also testify about the value of the plaintiff's alleged lost opportunity to participate in Wal-Mart's stock option plan, *id*. at 5, and the cost of replacing the plaintiff's term life insurance, Filler Aff. at 2. These are not topics on which the knowledge of the general public is likely to equal that of Filler. Filler's proposed testimony meets the second requirements of Rule 702.

The defendants' argument also addresses the third element of Rule 702.

> The fundamental question that a court must answer in determining whether a proposed expert's testimony will assist the trier of fact is whether the untrained layman would be qualified to determine intelligently and to the best degree, the particular issue without enlightenment from those having a specialized understanding of the subject matter involved.

Shay, 57 F.3d at 132 (citation and internal punctuation omitted). Here, Filler's proposed testimony is relevant, informed by expertise, and potentially helpful to a jury. Nothing further is required under Rule 702. *Id*. at 133.

The defendants devote a substantial portion of their submissions in connection with this motion to an argument that Filler's testimony must be excluded as unreliable, because it is "just a paid opinion based on speculation and false assumptions." Motion in Limine at 5. They do not identify any of the "false assumptions," apparently equating them with "the Plaintiff's own unsubstantiated assertions," which also go unidentified. *Id*. at 6.[2]

[2] One such "unsubstantiated assumption" is identified in the defendants' reply memorandum. They contend that Filler's use of the plaintiff's statement concerning the estimated amounts of his annual bonuses in the past to determine a percentage figure to apply to generate an estimated lost incentive bonus is inconsistent with Wal-Mart's "very specific policy and formula regarding the incentive bonus," which was provided to the plaintiff in discovery. Defendants' Reply to Plaintiff's Objection to Defendants' Motion in Limine, etc. (Docket No. 45) at 2-3. This possible inconsistency does not render the plaintiff's statements concerning past bonuses received "unsubstantiated assumptions." This argument and information represents a challenge to the weight of Filler's testimony, not its admissibility. The same is true of the defendants' assertion that "[l]abeling travel expenses as damages in an FMLA case illustrates that Mr. Filler's opinion is more advocacy than a realistic estimate of the economic damages the Plaintiff suffered." Motion in Limine at 6. In (*continued on next page*)

> Although expert testimony should be excluded if it is speculative or conjectural, or if it is based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison, other contentions that the assumptions are unfounded go to the weight, not the admissibility, of the testimony.

Boucher v. U. S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996) (citations and internal quotation marks omitted). That is the case here; the defendants have not made a showing that Filler's proposed testimony suggests bad faith or compares essentially dissimilar elements. At this point, "[t]he issue is not whether [Filler is] right: but, rather, whether he ha[s] sufficient factual grounds on which to draw conclusions." *Damon v. Sun Co.*, 87 F.3d 1467, 1475 (1st Cir. 1996). On the showing made, Filler's proposed testimony is sufficiently grounded.

The defendants also contend that Filler's "overly optimistic unsubstantiated projections" about damages "will mislead and confuse the jury and introduce unfair prejudice into the case." Motion in Limine at 7. They cite no authority in support of this brief argument. A motion to strike testimony pursuant to Fed. R. Evid. 403, the basis for this portion of the defendants' argument, on the ground that the probative value of the testimony or report is outweighed by the danger of unfair prejudice or confusion is not appropriate in the context of summary judgment, where matters are not presented to a jury and the court does not weigh credibility or resolve disputed issues of material fact, except in extraordinary circumstances not present here. *See, e.g., Adams v. Ameritech Servs., Inc.*, 231 F.3d 414, 428 (7th Cir. 2000); *Hines v. Consolidated Rail Corp*., 926 F.2d 262, 274 (3d Cir. 1991). Accordingly, I do not address this portion of the defendants' argument. My denial of the motion to strike on other grounds will not preclude the defendants from raising this issue with the trial judge before trial if they wish to do so.

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addition, the defendants cite no authority in support of their contention that travel exp enses are not available as damages (*continued on next page*)

The defendants' motion to exclude Filler's report and testimony should be denied.

III. Motions for Summary Judgment

A. Applicable Legal Standard

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp*., 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come

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in FMLA cases.

forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* ("Wright, Miller & Kane") § 2720 at 327-28 (3d ed. 1998). For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720.

B. Factual Background

The following undisputed material facts are appropriately supported in the parties' statements of material facts, submitted in accordance with this court's Local Rule 56.

The plaintiff, a 66-year-old resident of Gorham, Maine, began his employment with Wal-Mart on July 31, 1998. Defendants' SMF ¶¶ 1-2; Plaintiff's Responses to Defendant's Statements of Material Fact ("Plaintiff's Responsive SMF") (Docket No. 39) ¶¶ 1-2; Plaintiff's Statement of Material Facts ("Plaintiff's SMF") (Docket No. 20) ¶ 5; Defendants' Response to Plaintiff's Statement of Material Facts ("Defendants' Responsive SMF") (Docket No. 34) ¶ 5. Defendant Swink is Wal-Mart's TLE District Manager, a position he has held since November 1999, and formerly was the plaintiff's supervisor. Plaintiff's SMF ¶ 3; Defendants' Responsive SMF ¶ 3; Defendants' SMF ¶ 68; Plaintiff's Responsive SMF

¶ 68. The plaintiff was first hired by Wal-Mart as a pricing coordinator and back-up direct store delivery receiver for the Wal-Mart store in Melbourne, Florida. Defendants' SMF ¶¶ 29, 33; Plaintiff's Responsive SMF ¶¶ 29, 33. In February 1999 the plaintiff was promoted to sporting goods manager at the same store. *Id*. ¶ 45. The plaintiff was later employed by Wal-Mart as a grocery manager. *Id*. ¶ 46.

In August 2000 the plaintiff began employment as a TLE management trainee for Wal-Mart in West Melbourne, Florida. *Id*. ¶ 47. From December 2000 to April 2001 the plaintiff was a TLE manager trainee at Wal-Mart's Merritt Island, Florida store. *Id*. ¶ 49.

Wal-Mart stores are organized with a store manager or two co-managers at the top of the structure within the store and several other salaried assistant managers at each site. *Id*. ¶ 59. The TLE manager in a store runs the TLE specialty part of the store and reports to both the store manager and the TLE regional manager. *Id*. ¶ 60. The job description for TLE managers that was in effect in February 2000[3] does not address work hours. *Id*. ¶ 62. Swink testified that Wal-Mart did not have a written policy documenting the work schedule for TLE managers prior to October 12, 2002. *Id*. ¶ 65. He also testified that TLE managers were treated as assistant managers under Wal-Mart's Management Work Schedule Policy and had worked the same hours as assistant managers for the entire ten years that he had been employed by Wal-Mart. *Id*. ¶¶ 62, 66.

While he was in Maine on vacation in September 2001 the plaintiff stopped into the Windham Wal-Mart, contacted Swink and interviewed with Swink for the TLE manager position at the Windham store. *Id*. ¶ 109. Swink hired the plaintiff for this position, which he began on October 6, 2001. *Id*. ¶ 110. When

[3] The plaintiff's response to this paragraph of the defendants' statement of material facts states, *inter alia*, that "plaintiff is unable to say as of what date the policy was in effect since it is undated." Plaintiff's Responsive SMF ¶ 62. That assertion is presented as a qualification, but it is not supported by citation to any evidence in the summary judgment record that would allow a reasonable factfinder to conclude that the date given by the defendants is incorrect.

he started this position, the plaintiff worked six days a week from 6:00 or 6:30 a.m. until 6:00 or 7:00 p.m. *Id*. ¶ 113. On or about November 15, 2001 the plaintiff provided the Windham store manager, Brett Walters, with an out-of-work note resulting from the care he was receiving for a medical issue. *Id*. ¶¶ 114-15. The plaintiff saw physician's assistant Mark Rao on November 15, 2001. Plaintiff's SMF ¶ 8; Defendants' Responsive SMF ¶ 8. Rao determined that the plaintiff's blood pressure was very high and prescribed medication that the plaintiff is still required to take. *Id*. ¶ 9. Rao wrote the doctor's note which the plaintiff delivered to Wal-Mart. *Id*. ¶ 10. The plaintiff testified that Walters requested that the plaintiff call Walters in the future if he were going to call out. Defendants' SMF ¶ 121; Plaintiff's Responsive SMF ¶ 121.

The plaintiff returned to work on November 20 and also worked the next day. Plaintiff's SMF ¶ 11; Defendants' Responsive SMF ¶ 11. After a medical appointment on December 3, the plaintiff advised Swink that he would need a medical leave of absence. *Id*. ¶ 13. At a meeting with Swink and Walters on December 5, the plaintiff presented a medical note which stated that he would be having some intensive testing on January 8 and should not work until after that date so that it could be determined whether he had serious heart problems. *Id*. ¶ 14. The last sentence of this note read: "Please feel free to contact me if there are any questions." Defendants' SMF ¶ 140; Plaintiff's Responsive SMF ¶ 140. A stress test on January 8, 2002 indicated a blockage near the plaintiff's heart and his leave of absence was therefore extended until he could undergo additional testing. Plaintiff's SMF ¶ 15; Defendants' Responsive SMF ¶ 15.

On January 25, 2002 Rao wrote a note indicating that the plaintiff's medical condition had stabilized and he could return to work but should be restricted to 40 hours per week with two consecutive days off. *Id*. ¶ 16. The plaintiff delivered this note to Walters on January 28. *Id*. ¶ 17. He worked eight hours each on January 28, January 29 and January 30. Defendants' SMF ¶ 181; Plaintiff's Responsive SMF ¶ 181.

Before November 15, 2001 the plaintiff worked at the Windham store more than eight-hour days, more than 40 hours per week and without two consecutive days off. *Id*. ¶ 177.

On January 30, 2002 the plaintiff slipped and fell on some ice at his home. *Id*. ¶ 183. He obtained an out-of-work note from Rao as a result of this fall that kept him out of work until February 4, 2001. *Id*. ¶ 184. The plaintiff and Swink had a telephone conversation early in February during which the plaintiff alleges that Swink told him that he should not come back to work until he could work 48-52 hours per week. *Id*. ¶ 186. The plaintiff did not return to work on February 4 because it was his understanding that he was not to do so until he could work up to 52 hours per week. Plaintiff's SMF ¶ 29; Defendants' Responsive SMF ¶ 29. The plaintiff testified that he spoke with Swink again on February 8 and that they discussed trying to find the plaintiff a job consistent with his restrictions. Defendants' SMF ¶ 194; Plaintiff's Responsive SMF ¶ 194. He also testified that Swink told him during this conversation that if he could not work 52 hours at the end of his leave of absence he would have to step down to an hourly position, which Swink would help him find. *Id*. As of February 4, 2002 the plaintiff's twelve weeks of FMLA leave had not been exhausted. Plaintiff's SMF ¶ 33; Defendants' Responsive SMF ¶ 33.

On February 13, 2002 the plaintiff met with Wal-Mart's district manager, Kevin Robinson, at the plaintiff's request. *Id*. ¶ 37; Defendants' SMF ¶ 197; Plaintiff's Responsive SMF ¶ 197. The plaintiff brought a resume to this meeting, at which he and Robinson had a long discussion about job possibilities at the Biddeford store. Defendants' SMF ¶ 199; Plaintiff's Responsive SMF ¶ 199. Robinson directed his assistant to help identify potential positions in Biddeford, Falmouth or Scarborough. *Id*. The plaintiff spoke with Robinson's assistant two days later about five potential positions and had an interview on February 19, 2002. *Id*. ¶ 204.

On February 28, 2002 Swink wrote to the plaintiff advising him that his FMLA leave had expired on February 27 and stating that the information Wal-Mart had on file was that the plaintiff's work capacity was 40 hours per week with two consecutive days off. *Id*. ¶¶ 205, 208; Plaintiff's SMF ¶ 43; Defendants' Responsive SMF ¶ 43. The letter advised the plaintiff that his job would be held open until March 7, 2002 to give him the opportunity to provide an update on his medical condition. Defendants' SMF ¶ 210; Plaintiff's Responsive SMF ¶ 210.

On March 5, 2002 the plaintiff sent a letter to Swink enclosing a letter from Rao which allowed him to work up to 45 hours per week and up to 9 hours per day provided he was given two consecutive days off each week. Plaintiff's SMF ¶ 44; Defendants' Responsive SMF ¶ 44. In the letter, the plaintiff stated that he was anxious to return to his position as TLE manager, *id*. ¶ 45, and that he believed that the job could be done in 40-45 hours per week, Defendants' SMF ¶ 215; Plaintiff's Responsive SMF ¶ 215. At the end of the enclosed note written by Rao is the statement: "Please feel free to contact me if there are any questions pertaining to my recommendation." *Id*. ¶ 220.

The plaintiff testified that Swink called him on March 14, 2002 and spoke with him about helping him to find a job. *Id*. ¶ 221. During this conversation Swink told the plaintiff about a possible opening at the Falmouth store. *Id*. ¶ 225. A meeting was held at Robinson's office on March 22, 2002 to find a position for the plaintiff that was consistent with his medical restrictions. *Id*. ¶¶ 229, 231. Present at the meeting were the plaintiff, Robinson, his assistant, Swink, Jeff Ballenger and Amy Pepin. *Id*. ¶ 230. At this meeting a job opening for an hourly inventory control specialist at the Biddeford store, which was consistent with the plaintiff's medical restrictions, was identified; the plaintiff accepted this position effective March 23, 2002. *Id.* ¶ 233. Until this date the plaintiff received his TLE manager salary. *Id*. ¶ 234. Wal-Mart still requires TLE managers to work 48-52 hours per week without two consecutive days off. *Id*. ¶ 239. The

plaintiff has not been medically cleared to work 48-52 hours per week without two consecutive days off. *Id*. ¶ 240.

Swink contacted Rao on two occasions to determine whether the plaintiff's medical condition was a long-term matter. Plaintiff's SMF ¶¶ 52-53; Defendants' Responsive SMF ¶¶ 52-53; Defendants' SMF ¶ 243; Plaintiff's Responsive SMF ¶ 243.

C. Discussion

1. The Plaintiff's Motion. The plaintiff apparently seeks summary judgment on liability only as to Counts I and II of his amended complaint. Motion for Partial Summary Judgment (Docket No. 19). He contends that the defendants were obligated by the FMLA to tell him that he could continue in his position as TLE manager and work no more than 40 hours per week and that Swink violated the FMLA by contacting Rao. Memorandum Supporting Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Motion") (attached to Docket No. 19) at 4, 8.

a. Count I

The plaintiff cites 29 C.F.R. §§ 825.208(a)(2), 825.208(b)(1) and 825.302(f) in support of his first contention, which corresponds to Count I of the amended complaint. *Id*. at 5, 7; Complaint ¶¶ 32-33. Specifically, he asserts that Swink violated these regulations by failing to advise him during their telephone conversation in early February 2002 that he could continue to work as TLE manager "for up to 40 hours a week with the balance of his required hours being charged as reduced hours leave or intermittent leave under the FMLA," Plaintiff's Motion at 4, and that this failure "was the only reason that Mr. Whitney did not report for work on February 4th," *id*. at 6. This resulted, the plaintiff contends, in premature exhaustion of his FMLA leave in violation of 29 C.F.R. § 825.203(d). *Id*. at 7. Neither the amended complaint nor the plaintiff's motion identifies any statutory basis for his claims, but the sole statute cited in the amended

complaint in connection with Count I, 29 U.S.C. § 2617, Amended Complaint ¶ 32, provides a cause of action when an employer violates 29 U.S.C. § 2615, 29 U.S.C. § 2617(a)(1).[4]

The defendants present several arguments in response. They first contend that the regulations on which the plaintiff relies are invalid under the Supreme Court's recent decision in *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002), which struck down 29 C.F.R. § 825.700(a), a notice provision under the FMLA. Defendants' Objection to Plaintiff's Motion for Partial Summary Judgment ("Defendants' Objection") (Docket No. 35) at 8-11. The provision at issue in *Ragsdale* punished an employer's failure to provide timely notice of the employer's designation of leave as FMLA leave by denying the employer any credit for leave granted before the notice. 535 U.S. at 88. The regulatory provisions on which the plaintiff relies in this case are the following, in relevant part:

> There is no limit on the size of an increment of leave when an employee takes intermittent leave or leave on a reduced leave schedule. . . . An employee may not be required to take more FMLA leave than necessary to address the circumstance that precipitated the need for the leave . . . .
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> * * *
>
> [A]n employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave.
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> * * *
>
> Once the employer has acquired knowledge that the leave is being taken for an FMLA required reason, the employer must promptly (within two business days absent extenuating circumstances) notify the employee that the paid leave is designated and will be counted as FMLA leave. . . .
>
> * * *
>
> In the case of intermittent leave or leave on a reduced leave schedule which is medically necessary, an employee shall advise the employer, upon request, of the reasons why the intermittent/reduced leave schedule is necessary and of the schedule for treatment, if applicable. The employee and employer shall attempt

[4] That section of the FMLA bars employers from interfering with, restraining or denying the exercise of or attempt to exercise any right provided by the FMLA, the only portion of the section that could conceivably apply to the facts as alleged in this case. 29 U.S.C. § 2615(a)(1).

> to work out a schedule which meets the employee's needs without unduly disrupting the employer's operations, subject to the approval of the health care provider.

29 C.F.R. §§ 825.203(d), 825.208(a)(2), 825.208(b)(1), 825.302(f). Section 825.208(b)(1) provides the basis for all of the plaintiff's arguments with respect to Count I; he contends that the other alleged violations arose because the defendants did not notify him that he could take his remaining FMLA leave on an intermittent basis. That asserted responsibility could not possibly be said to be imposed by any of the other regulations cited by the plaintiff.

Since *Ragsdale*, "[s]everal circuits have rejected" 29 C.F.R. § 825.208. *Roberson v. Cendant Travel Servs., Inc.*, 252 F.Supp.2d 573, 577 (M.D.Tenn. 2002) (citing cases from the Second, Eighth and Eleventh Circuits). *See also Donahoo v. Master Data Ctr.*, 282 F.Supp.2d 540, 555 (E.D.Mich. 2003) (holding notice provisions of section 825.208 invalid under *Ragsdale*). The First Circuit has not ruled on this question. Under the circumstances of this motion, it is not necessary to predict how the First Circuit would rule because the plaintiff has not presented evidence that would allow a reasonable factfinder to conclude that either of the subsections of 29 C.F.R. § 825.208 on which he relies were violated.[5] The plaintiff's notice to the defendants, the subject of section 825.208(a)(2), is not at issue here. Section 825.208(b)(1) cannot be read to require an employer to notify an employee of anything other than the fact that paid leave is being designated as FMLA leave and certainly not to require an employer to inform an employee that he could take any remaining FMLA leave on an intermittent basis. The plaintiff is not entitled to summary judgment on the claim he has presented under 29 C.F.R. § 825.208.

[5] To the extent that the plaintiff purports to rely on an internal Wal-Mart policy as the source of the alleged requirement, Plaintiff's SMF ¶ 31; Plaintiff's Motion at 6-7, such a claim sounds in breach of contract; violation of an employer's internal policy is not itself a statutory violation.

Section 825.302 contemplates notice by the employee that intermittent leave is needed; the plaintiff has offered no evidence that he suggested or asked for intermittent leave at the critical time. The regulation cannot reasonably be interpreted to require the employer to offer intermittent leave on its own; even if that interpretation were possible, the evidence is in dispute on the question whether Wal-Mart had informed the plaintiff that intermittent leave was available. *E.g.*, Defendants' Responsive SMF ¶ 31; Defendants' SMF ¶¶144-50, 154, 157. The plaintiff is not entitled to summary judgment on any claim arising under this regulatory provision.

The evidence is also in dispute with respect to any possible violation of section 825.203. Resolution of this issue depends on whether a factfinder credits the plaintiff's version of the telephone call — that Swink told him not to come back to work until he could work up to 52 hours per week, Plaintiff's SMF ¶¶ 29-30 — or the defendants' version — that Swink and the plaintiff discussed only what would happen after the plaintiff had exhausted his FMLA leave and that the question of how that leave would be exhausted never came up, Defendants' SMF ¶¶ 187-90. The plaintiff is not entitled to summary judgment on any claim arising under this regulatory provision.

b. Count II

In Count II of the amended complaint the plaintiff contends that the defendants violated 29 C.F.R. § 825.307 when Swink contacted Rao twice. Plaintiff's Motion at 8-9. The defendants' first argument in response is that Swink cannot be individually liable on this claim. Defendants' Opposition at 14-15. The plaintiff refers to this argument in his reply, but does not respond to it. Plaintiff's Memorandum Replying to Defendants' Objection to Motion for Partial Summary Judgment ("Plaintiff's Reply") (Docket No. 42) at 7-8. This court has set forth the requirements for individual liability under the FMLA. *Brunelle v. Cytec Plastics, Inc.*, 225 F.Supp.2d 67, 82 (D. Me. 2002). The plaintiff makes no attempt in connection with his

motion to show that these requirements have been met and he accordingly cannot be entitled to summary judgment against Swink on liability under Count II.

The defendants next contend that section 825.307 is "entirely inapplicable," because Swink did not contact Rao to "question the adequacy of a health care certification in conjunction with approving a leave of absence." Defendants' Opposition at 17. The relevant portion of the regulation at issue provides:

> If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity [sic] of the medical certification.

29 C.F.R. § 825.307(a). My research has not located any reported case in which this regulation provided the basis for a cause of action. However, the defendants do not oppose summary judgment on this basis. Their proposed distinction is far too fine. The language of the regulation is absolute; if the employee submits a complete medical certificate, a point not disputed by the defendants, the employer may not request additional information from the health care provider. Swink's assertion, disputed by the plaintiff, that the plaintiff gave Swink permission to contact Rao, Defendants' SMF ¶ 141; Plaintiff's Responsive SMF ¶ 141, appears to make no difference under the plain language of the regulation.

The defendants fare somewhat better with their extremely brief argument that the plaintiff has not demonstrated that the alleged violation of section 825.307(a) interfered with his exercise of his FMLA rights, which is the basis for a claim under 29 U.S.C. § 2615(a)(1). Defendants' Opposition at 17. The plaintiff responds, in similarly summary fashion, that Swink's contacts with Rao interfered with his exercise of his FMLA rights "by invading his medical privacy in violation of 29 U.S.C. § 2615(a)." Plaintiff's Reply at 8. Section 2615(a) does not refer to privacy rights. Protection of medical privacy is not mentioned in the

statement of purposes of the FMLA. 29 U.S.C. § 2601(b). In the absence of any citation to a provision of the FMLA giving an employee a right to "medical privacy,"[6] the plaintiff has not established a right provided under the FMLA with which the alleged violation of 29 C.F.R. § 825.307(a) interfered and accordingly has not established his entitlement to summary judgment on Count II. *See, e.g., Alifano v. Merck & Co.*, 175 F.Supp.2d 792, 794 (E.D. Pa. 2001) ("In order for Plaintiff to state a cause of action for interference with her FMLA rights, she must claim that the alleged interference cause her to forfeit her FMLA protections.").

2. The Defendants' Motion.

a. Defendant Swink

The defendants first contend that Swink is not individually liable under the FMLA, the basis for Counts I and II. Defendants' Motion for Summary Judgment, etc. ("Defendants' Motion") (Docket No. 21) at 9-11. As the defendants point out, *id.* at 9, the FMLA by its terms imposes liability only on employers. 29 U.S.C. §§ 2615(a), 2617(a). However, the FMLA defines the term "employer" to include "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer." 29 U.S.C. § 2611(4)(A)(ii)(I). In *Brunelle*, this court analyzed the issue of individual liability under the FMLA in accordance with the test established under the Fair Labor Standards Act. 225 F.Supp.2d at 82. This test has five elements: whether the individual defendant (i) had the power to hire and fire the employee, (ii) supervised and controlled employee work schedules or conditions of employment, (iii) determined the rate and method of payment of the employee, (iv) maintained employment records and (v) had personal responsibility for making decisions that contributed to the alleged violation. *Id.* The plaintiff contends that the summary judgment record includes facts that would allow a factfinder to conclude that

[6] My own research has located no reported case in which an employee asserted that a right to medical privacy is provided (*continued on next page*)

"Defendant Swink meets all of these criteria," Plaintiff's Memorandum Opposing Defendants' Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 38) at 5, but none of the paragraphs of the statement of additional material facts that he submitted in opposition to the defendants' motion that he cites in support of this assertion has anything to do with the facts he asserts, *compare id.* at 5-6 *with* Plaintiff's Opposing Additional Statements of Material Fact, etc. ("Plaintiff's Additional SMF") (Docket No. 40) ¶¶ 1-5.

While the evidence in the summary judgment record would allow a reasonable factfinder to conclude that Swink had some personal responsibility for making the decisions challenged by the plaintiff, *e.g.*, Plaintiff's SMF ¶¶ 28-30, 32, 42, 52-53; Plaintiff's Additional SMF ¶¶ 22, 36-37, there is little or no evidence that would allow a reasonable factfinder to conclude that the other four elements were established. The summary judgment record includes evidence (i) that Swink hired the plaintiff for the TLE manager position at issue, Defendants' SMF ¶ 110, Plaintiff's Responsive SMF ¶ 110, but no evidence that Swink had the power to fire Swink; and (ii) evidence that would allow a reasonable inference that Swink supervised or controlled the plaintiff's work schedule,[7] *id.* ¶¶ 128-29, 154, 164, 186, 205, but not that he supervised or controlled any other conditions of the plaintiff's employment. There is no evidence that Swink determined the plaintiff's rate and method of payment or that he maintained Wal-Mart's employment records. On this record, it is equally possible that Walters, Robinson or some other Wal-Mart employee did these things. *See, e.g.*, Defendants' SMF ¶ 60; Plaintiff's Responsive SMF ¶ 60 (plaintiff reported to both Walters and Swink); *id.* ¶ 111 (plaintiff's base salary at Windham store same as it had been at Orlando, Florida store); *id.* ¶ 119 (plaintiff gave Rao's note to Walters); 136 (plaintiff met with Walters and

by the FMLA and therefore may serve as the basis for a claim under 29 U.S.C. § 2615(a).

Swink to discuss request for medical leave); *id.* ¶ 162 (Walters approved plaintiff's leave of absence); Plaintiff's Opposing Additional Statements of Material Fact, etc. (Docket No. 40) ¶ 27; Defendants' Response to Plaintiff's Opposing Additional Statements of Material Fact (Docket No. 43) ¶ 17 (plaintiff met with Robinson to discuss available positions at Wal-Mart stores). As a result of this lack of evidence, Swink is entitled to summary judgment on Counts I and II. *See Donovan v. Agnew*, 712 F.2d 1509, 1514 (1st Cir. 1983) (FLSA case); *Keene v. Rinaldi*, 127 F.Supp.2d 770, 777-78 & n.3 (M.D.N.C. 2000) (FMLA case).

b. Defendant Wal-Mart

Wal-Mart seeks summary judgment on Counts I and II of the amended complaint based on an assertion that it did not interfere with the plaintiff's exercise of his FMLA rights. Defendants' Motion at 11-16. The plaintiff does not respond directly to this argument, discussing instead alleged violations by Wal-Mart of regulations implementing the FMLA. Plaintiff's Opposition at 6-16. The plaintiff's argument, indulgently read, can be construed to claim such interference with respect to Count I of the amended complaint. However, as I have already discussed, the same is not true with respect to Count II.

In his opposition to the motion for summary judgment on Count II, the plaintiff does not refer, even obliquely, to any right under the FMLA with which the defendants interfered by contacting Rao in violation of 29 C.F.R. § 825.307, and none is apparent. Such a right must be identified in order for relief to be available under 29 U.S.C. § 2615(a). In addition, the plaintiff has made no showing that the alleged violation of the regulation caused him any injury, another necessary element for relief under the statute. *E.g., Dressler v. Community Serv. Communications, Inc.*, 275 F.Supp.2d 17, 23 n.10 (D. Me. 2003);

[7] There is also evidence that Walters, the store manager, exercised such control. Defendants' SMF ¶ 169; Plaintiff's (*continued on next page*)

Alifano, 175 F.Supp.2d at 794. Wal-Mart is entitled to summary judgment on Count II of the amended complaint.

As I noted in my discussion of Count I in connection with the plaintiff's motion for partial summary judgment, he bases his claim in that count on alleged violations of four sections of the regulations implementing the FMLA. At this juncture, it is necessary to decide whether the two subsections of 29 C.F.R. § 825.208 on which the plaintiff relies are invalid after the Supreme Court's decision in *Ragsdale*. One of those subsections, 29 C.F.R. § 825.208(a)(2), merely provides that an employee need not expressly state that he is seeking FMLA leave when notifying the employer of his intent to take leave that may qualify as FMLA leave. That subsection has no bearing on the defendants' motion for summary judgment, nor does it, standing alone, entitle the plaintiff to any relief in this case. Accordingly, I will not consider it further. The other subsection, 29 C.F.R. § 825.208(b)(1), requires the employer to notify the employee within two business days that any paid leave has been designated and will be counted as FMLA leave. This is the only possible source, among those cited by the plaintiff, for his claim that the defendants violated the FMLA by failing to inform him that he could take weekly hours in excess of 40 or 45 as intermittent FMLA leave.

Subsection 825.208(b)(1), like 29 C.F.R. § 825.700(a) that was at issue in *Ragsdale*, is a notice provision.[8] In his argument opposing the defendants' position that *Ragsdale* requires invalidation of section

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Responsive SMF ¶ 169.

[8] 29 C.F.R. § 825.208(c) provides a remedy for violation of subsection 825.208(b)(1): "If the employer has the requisite knowledge to make a determination that the paid leave is for an FMLA reason at the time the employee either gives notice of the need for leave or commences leave and fails to designate the leave as FMLA leave (and so notify the employee in accordance with paragraph (b)), the employer may not designate leave as FMLA leave retroactively . . . . In such circumstances, the employee is subject to the full protections of the Act, but none of the absence preceding the notice to the employee of the designation may be counted against the employee's 12-week FMLA leave entitlement."

825.208(b)(1), the plaintiff does not cite any case law upholding the regulation against such a challenge.[9] I have already noted the case law supporting the defendants' position. The plaintiff instead attempts to distinguish *Ragsdale*, asserting that "the Supreme Court indicated that its holding would probably have been different if the employee had been able to show that she had been prejudiced by not receiving prompt notice of her FMLA entitlement," Plaintiff's Opposition at 9, contending that he was "clearly prejudiced by Wal-Mart's failure to advise him that he could have remained in his position as TLE Manager using reduced hours or intermittent leave," *id*. at 10. To some extent, this argument misses the point. The Supreme Court invalidated the penalty attached to the notice provision at issue in *Ragsdale*, noting that employees might be able to recover, on a case-by-case basis, for lack of notice if they could demonstrate that they were prejudiced by that lack. 535 U.S. at 88-96. The Supreme Court did state that it was not deciding whether "the notice and designation requirements are themselves valid or whether other means of enforcing them might be consistent with the statute." *Id*. at 96. Thus, to the extent that the plaintiff means in this case to claim the remedy provided by 29 C.F.R. § 825.208(c), *Ragsdale* has made that relief unavailable. *See Donahoo*, 282 F.Supp.2d at 555; *Roberson*, 252 F.Supp.2d at 577. However, the plaintiff also contends that he was prejudiced by the alleged lack of notice, in that he used up his 12 weeks of FMLA leave sooner than he would have otherwise, with a resulting loss of income and benefits for at least an identifiable period until his FMLA leave would have been exhausted if he began using it intermittently on February 4, 2002.[10] This claim is not precluded by *Ragsdale* or the later case law.

[9] My own research has located only one unreported case reaching this conclusion. *Phillips v. Leroy-Somer North Am.*, 2003 WL 1790941 (W.D.Tenn. Mar. 28, 2003), at *7.

[10] The defendants do not argue that 29 C.F.R. § 825.208(b)(1) does not require them to give the specific notice that the plaintiff alleges was not given.

It is for this reason that the defendants' contention that they are entitled to summary judgment because the plaintiff received all of the FMLA leave to which he was entitled must fail as well. The plaintiff has submitted evidence that would allow a reasonable factfinder to conclude that he was required by the defendants to take his FMLA leave continuously rather than on an intermittent basis, resulting in some loss of income and benefits because he had to take an hourly position sooner than would otherwise have been the case. The summary judgment record does not demonstrate when the plaintiff's FMLA leave would have been exhausted if he had taken it on an intermittent basis beginning on February 4, 2002, at which point he would have been unable to meet the requirements of the position. Nor does it allow a determination whether, at a rate of 3 to 12 hours per week, the leave would not have been exhausted in a calendar year, at which point the defendants' expressed concern that the plaintiff "is trying to use the FMLA [to obtain] indefinite tenure in a job he is no longer medically capable of performing," Defendants' Reply at 7, would become relevant.

The evidence concerning notice to the plaintiff is very much in dispute. Wal-Mart is entitled to summary judgment in connection with the plaintiff's claim under 29 C.F.R. § 825.280(b)(1) only to the extent that the plaintiff seeks the relief provided by 29 C.F.R. § 825.280(c).

The defendants do not address the plaintiff's claims under 29 C.F.R. §§ 825.203(d)[11] and 825.302(f) directly, relying on their general argument that the plaintiff cannot show that they interfered with his FMLA rights in any way. Defendants' Motion at 11-16; Defendants' Reply at 4-7. As I have already discussed, the plaintiff has submitted evidence that would allow a reasonable factfinder to conclude that Wal-Mart interfered with his right to intermittent leave under the FMLA. On the showing made, Wal-Mart

[11] With respect to the possibility that Wal-Mart in effect required the plaintiff to take more FMLA leave than necessary, (*continued on next page*)

is not entitled to summary judgment on claims based on those regulatory sections in Count I of the amended complaint.

IV. Conclusion

For the foregoing reasons, the defendants' motion *in limine* to exclude the testimony and report of the plaintiff's designated damages expert (Docket No. 24) is **DENIED**; and I recommend that:

A. the defendants' motion to dismiss Count III (Docket No. 33) be **GRANTED** as to defendant Swink and otherwise **DENIED**;

B. the plaintiff's motion for partial summary judgment (Docket No. 19) be **DENIED**; and

C. the defendants' motion for summary judgment (Docket No. 21) be **GRANTED** as to Count II, as to Count I against defendant Swink, and as to Count I against defendant Wal-Mart insofar as it seeks relief under 29 C.F.R. § 825.280(c), and otherwise **DENIED**.

Remaining for trial, if the court adopts my recommendations, will be Count I (except insofar as it seeks relief under 29 C.F.R. § 825.280(c)) and Count III against defendant Wal-Mart Stores, Inc.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

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the subject matter of this regulatory section, the evidence again is very much in dispute.

Dated this 16th day of December 2003.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

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